> beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

To determine Congress' intent, the Court examines the explicit statutory language and the structure and the purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). The plain language of the statute provides that the court in its discretion may grant either party reasonable attorneys' fees.

This can be compared to ERISA Section 502(g)(2), 29 U.S.C. § 1132(g)(2), for which an award of attorneys' fees and costs are mandatory in a case where the plan is enforcing 29 U.S.C. § 1145, collection of contributions.

A. The Private Attorney General Doctrine Does Not Apply to ERISA

The private attorney general doctrine permits a court to award attorneys' fees to a plaintiff who pursues public interest litigation which Congress makes a high priority. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The private attorney general doctrine has been invoked in civil rights cases where constitutional rights are at issue. The private attorney general doctrine is an exception to the American Rule.

The Fifth Circuit in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980) rejected the private attorney general doctrine in relation to cases filed under the ERISA statute.

> The policies underlying ERISA... do not raise to the level of assuring all citizens are accorded their civil rights... Plaintiffs suing under [civil rights] statutes are "private attorneys general" in the sense that they seek injunctive relief to vindicate important public rights. If such "plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." **Plaintiffs under Title I of ERISA may be seeking... simply the recovery of benefits from the plan that are due them alone**... Thus, incentives in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced.

Ellison v. Shenango Pension Board, 956 F.2d 1268, 1275 (3d Cir. 1992) *quoting Bowen*, 624 F.2d at 1265. (Emphasis added.)

ERISA protects a participant's economic interest, not a constitutional right or social mandate. ERISA was enacted for the protection of employees' pensions, but at the same time "strike an appropriate balance between the interests of

employers and labor organizations in maintaining flexibility in the design and operation of their pension programs. H.R.Rep. No. 93-533(1973) *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

Although ERISA is an important statute, it is not a law enforcing a constitutional right. In that ERISA does not invoke the private attorney general doctrine, the analogy to such provisions is weak. There is no important public or social issue to be decided and thus the Court should deny the petition in this matter.

II. The Third Circuit Applied the Five-Factor Analysis in DiGiacomo.

In *Ursic v. Bethlehem Mines*, 719 F. 2d 670, 673 (3d Cir. 1983) the Third Circuit adopted the five factors used in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), used in determining whether to issue an award of attorney's fees under 29 U.S.C. § 1132(g)(1). The five factors are:

1. The offending parties' culpability or bad faith;

2. The ability of the offending parties to satisfy an award of attorneys' fees;

3. The deterrent effect of an award of attorneys' fees against the offending parties;

4. The benefit conferred on members of the Pension Plan as a whole; and

5. The relative merits of the parties' position.

Ursic at 673.

In DiGiacomo, the court explicitedly stated that it follows *Ursic's* five factors as a guide to exercising its discretion. (Appendix 3a)

The Third Circuit in *DiGiacomo* did not limit its examination to the issue of bad faith, but looked also to the relative underlying merits of the parties' cases. The court held "that the Fund's legal position has significant merit." Although the Petitioner prevailed, the court stated that the issue involved was "close and difficult", with the Third Circuit issuing a 2-1 split decision. The procedural history of the case reflected that the Respondent prevailed in arbitration and at the district court level, where the district court followed the Third Circuit's precedent in *Tanzillo*, 769 F.2d 140, 145 (3d Cir. 1985) and *Haas*, 1992 WL 221335, *aff'd without op*, 993 F.2d 877 (3d Cir. 1993), granting the Pension Fund's motion to dismiss.

Although the Third Circuit did not explicitly address the other factors in its decision, it has previously held that the third factor, i.e., deterrent effect, would only be effective upon those with frivolous claims. "The deterrent effect will be beneficial upon those who contemplate speculative

and duplicative litigation on thinly based grounds." *Monkelis v. Mobay Chemical*, 827 F.2d 937 (3d Cir. 1987). In *Monkelis*, the plaintiff's claims were substantially without merit and were time barred. In *McPherson,* the Court explains that "it will further the objectives of ERISA if fees awarded to deter behavior that falls short of bad faith conduct." *McPherson v. Employees' Pension Plan of America Re-Insurance Co.*, 33 F.3d 253, 258 (3d Cir. 1994). The Court did not find any behavior "short of bad faith conduct" in this matter, as reflected by the statement that the issue in the case was a close and difficult one. If there were no bad faith and a meritorious argument, the Third Circuit would not find any deterrent effect in an award of attorneys' fees.

Other circuits have been inclined not to grant attorneys' fees where the fees were generated at the appellate level, where the unsuccessful party appealed and the issue has been "close and difficult". See *Cook v. Liberty Life Assurance Company of Boston*, 334 F.3d 122 (1st Cir. 2003). In *Cook*, attorneys' fees were denied prevailing participant where the administrator of a plan had appealed a decision reinstating the participant's long-term disability benefits. The court in *Cook* held that despite the fact that Liberty Life could afford to pay the attorneys' fees, and there may be a value for other participants in the clarification of standards an insurer must meet to terminate long-term disability benefits, those factors did not outweigh the lack of bad faith by Liberty Life and the plausible argument made on appeal. *Id* at 124. (In the

instant case, it was the participant who brought the appeal.)

A presumption of attorneys' fees and costs for the prevailing plaintiff in "close and difficult" cases, would put a chilling effect on litigation by benefit funds that have a fiduciary obligation to maintain the trust of a fund for all participants and beneficiaries. The Fund would have to make a decision for each benefit claim where there was a question of statutory interpretation of ERISA and weigh it against the cost bearing its own attorneys' fees *and* the plaintiff's attorneys' fees if they did not prevail.

By Congress giving the courts discretion, the courts are able to award attorneys' fees to those plaintiffs who could not bring an action otherwise, yet balance it with equitable considerations of the cases. The equitable review among the circuits in applying a court's discretion does not rise to a conflict that requires this Court's attention.

CONCLUSION

Based upon the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ALFRED DIGIACOMO,

Petitioner,

v.

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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PRELIMINARY STATEMENT

This Reply Brief is submitted in support of Alfred DiGiacomo's Petition For A Writ Of Certiorari to the United States Court of Appeals for the Third Circuit, in order to respond to the Brief in Opposition filed by Respondent Teamsters Pension Trust Fund Of Philadelphia And Vicinity (the "Fund").

In its Opposition Brief the Fund argues that (1) Congress did not intend to create a presumption to grant attorney's fees to "the prevailing party" in ERISA cases, and that (2) the Third Circuit did not deny fees solely because the issue was "close" and the Plan's defense was not frivolous, but applied the five-factor test adopted by most circuits. Those two arguments will be addressed below.

REASONS FOR GRANTING THE PETITION

I. CONGRESS INTENDED A PRESUMPTION IN FAVOR OF AWARDING FEES IN ERISA BENEFIT CASES

The Fund argues, first, that, if a presumption in favor of attorney's fees was intended, "Petitioner fails to address why Congress did not simply include such language in ERISA Section 502(g)(1), in light of the clear mandate for attorney's fees and coasts under ERISA Section 502(g)(2) to a prevailing party." At 6.[1] The difference between the parties and claims addressed by the two provisions explain the difference.

1. In fact, however, Section 502(g)(2) does *not* mandate the award of attorney's fees to "a prevailing party," only to a prevailing *plaintiff* who is a plan *fiduciary* enforcing an employer's *contribution requirements* of ERISA Section 514, 29 USC § 1145.

Section 502(g)(2) was adopted in 1980, thus six years after subsection (g)(1), was made applicable to only *one* specific action, a contribution enforcement action pursuant to ERISA Section 415, 29 USC § 1145, which was adopted at the same time as Section 502(g)(2); was limited to *one* type of plaintiff, a fiduciary in an action against *one* specific defendant, an employer, for relief in favor of *one* specific entity, a plan, on condition that the fiduciary prevail.[2] Indeed, as noted by this Court, quoting the Senate Committee on Labor and Human Resources, "the provision was added because 'simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions,' and steps must be taken to 'simplify delinquency collection.'" *Kaiser Steel v Mullins*, 455 US 72, 87, 102 SCt 851, 70 LEd2d 833 (1982). Given the specific and limited to purpose of the new collection provision, it made sense for Congress to make the award of fees *mandatory*.

By contrast, Section 502(g)(1), which was adopted in 1974, when ERISA was first enacted, applies to "any action under this subchapter", i.e., "Subchapter I - Protection Of Employee Benefit Rights"; provides standing to any participant, beneficiary or fiduciary; contains "no limit . . .

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2. Section 502(g)(2) provides in pertinent part:

> "In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan . . . (D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . ."

on the universe of possible defendants";[3] applies to a wide variety of legal and equitable relief; and permits the award of fees to either party regardless of prevailing-party status, i.e., fees can be awarded to a losing party.[4] In view of the broad scope of Section 502(g)(1), it was reasonable for Congress to make such awards discretionary, rather than mandatory as under Section 502(g)(2),

The fact, however, that a judge is vested with discretion to award attorney's fees to either party does not mean that such discretion is unlimited. Rather, the exercise of such broad discretion must be informed by the purpose of the provision. This Court has held that Section 502(g)(1) was adopted "in answer to a possible concern that attorney's fees might present a barrier to maintenance of suits for small claims." *Massachusetts Mutual v Russell*, 473 US 134, 147, 105 SCt 3085, 87 LEd2d 96 (1985). It follows from this goal that - at least in benefit claim cases - there must be a presumption in favor of the award of fees, otherwise a participant or beneficiary would be unable to find representation in a meritorious claim or, worse yet, be denied fees after winning a meritorious claim on the grounds that the issues was "close", as happened to DiGiacomo.

The Fund also argues that "Petitioner's statement that participants and beneficiaries have difficulty obtaining representation on a contingency fee basis, without the

3. *Harris Trust v Salomon Smith Barney*, 530 US 238, 246, 120 SCt. 2180, 147 LEd2d 187 (2000).

4. As adopted in 1974, Section 502(g) - later renumbered (g)(1) and amended - provided: "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

presumption of attorneys' fees is pure speculation." At 1. In the very next sentence, however, the Fund concedes that "[t]he fact is that the pool of attorneys knowledgeable in ERISA is limited, with many representing ERISA funds or employers." *Id.* Given the limited pool of experienced ERISA attorneys, and the fact that "many" represent plan sponsors or funds, it clearly follows that few experienced ERISA attorneys are available to participants and beneficiaries to begin with, let alone on a contingency basis. Moreover, because most pension claim are quite small, the only "contingency" is an award of statutory fees under Section 502(g)(1), a contingency that is entirely based on the presumption that fees will be awarded in case of a successful outcome. Only an ostrich with its head firmly planted in the sand could deny that even fewer, if any, ERISA attorneys would be willing to provide representation in meritorious, but "difficult", i.e., "close", cases, if success in such a case would lead not to an enhanced fee, but to a denial of any statutory fee.

In DiGiacomo's case, as noted in the Petition, attorney's fees incurred so far in the district court and in the Third Circuit exceed $ 60,000, while the additional pension benefit recovered is $ 500 per month. DiGiacomo would have to give up 10 years of pension benefits to pay his attorney. On the other hand, if no award is made, his attorney, Doris J. Dabrowski, will have to think long and hard before taking any more ERISA cases on behalf of participants. Indeed, she could not afford the considerable time and costs required for this Petition, which is being done on a *pro bono* basis. Could Congress have intended to limit pensioners with meritorious claims to the charity of strangers?

The Third Circuit's fee denial in "close" cases is clearly incompatible with Congress' stated policy in adopting ERISA, namely to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by providing . . . ready access to the Federal courts." ERISA Section 2(b), 29 USC § 1001(b).

Finally, the Fund argues that while "[t]he private attorney general doctrine permits a court to award attorneys' fees to a plaintiff who pursues public interest litigation which Congress makes a high priority", at 7, "there is no 'private attorney general' mandate contained in ERISA". At 6. Quite apart from the fact that the doctrine is only relevant in the absence of a statutory grant of attorney's fees, in fact participants and beneficiaries have to function as private attorney generals by default. In fact, the Secretary of Labor limits its ERISA enforcement activities to violations of fiduciary duties, without enforcing any of ERISA's minimum standards, as evidenced in the Secretary's yearly Reports to Congress.[5]

Similarly, the Internal Revenue Services's primary mission is to rule on the "qualification" of pension plans for tax purposes, not to enforce participants' benefit rights, which must instead be enforced in private litigation. *See, e.g., Flynn v CIR*, 269 F3d 1064 (DCC 2001). As a consequence, inasmuch as ERISA preempts all State enforcement, the

5. The latest such Report available on line is "Employee Retirement Income Security Act 2000 Report to Congress", issued by the Pension and Welfare Benefits Administration of the U.S. Department of Labor. This Court can take judicial notice of the enforcement actions detailed in those reports and also, generally, of the litigation conducted by the Secretary and available on LEXIS and WESTLAW.

enforcement of ERISA's minimum standards is left to participants and beneficiaries who, therefore, are clearly "private attorneys general".[6] Given the burden placed on participants to enforce ERISA, as well as their rights to benefits, there must a presumption that participants and beneficiaries bringing successful ERISA actions will be entitled to fees.

II. THE THIRD CIRCUIT APPLIED ONLY ONE FACTOR IN DENYING FEES

In his Petition, DiGiacomo argued that, although the Third Circuit, like most other Circuits, has adopted a five-factor test to decide ERISA attorney's fee applications, in fact it was alone in holding that bad faith is a *sine qua non* for a fee award. At 6. He argued that "in order to qualify for fees, a beneficiary must prevail on an issue that is neither 'close' nor 'difficult', i.e., where a benefit denial is frivolous or close to frivolous," Petition, p. 12. The Third Circuit, therefore, requires the defense position to be in bad faith. In its Brief in Opposition the Fund argues that the *DiGiacomo* court "did not limit its examination to the issue of bad faith, but looked also to the relative merits of the parties' cases." At 10.

The Fund argues that, "[a]lthough the Third Circuit did not explicitly address the other factors in its decision, it has previously held that the third factor, i.e., deterrent effect,

6. By contrast to ERISA rights, civil rights are enforced at the local, State and Federal level, so that individual actions are generally directed at individual economic wrongs, undercutting the Fund's argument that the presumption in favor of attorney's fees in civil rights cases is due to the fact that those actions vindicate "constitutional rights", as opposed to "economic interests". At 1.

would only be effective upon those with frivolous claims", at 10, relying on *Monkelis v Mobay Chemical*, 827 F2d 935 (3rd Cir 1987). *Monkelis*, however, awarded fees to the defendant because plaintiff's claim was frivolous, and does not therefore support the denial of fees to a prevailing plaintiff. (If, however, *Monkelis* were applicable, then Factor 3 (deterrence) would support a fee award only in the case of a frivolous defense, as DiGiacomo argued).

With respect to Factor 1 ("the offending parties' culpability or bad faith"), "culpability" in a civil context includes "the breach of a legal duty", i.e., "something more than simple negligence". *McPherson v Employees' Pension Plan Of American Re-Insurance Company*, 33 F3d 253, 257 (3rd Cir 1994). A violation of ERISA's minimum standards clearly constituted a "breach of a legal duty" and, therefore, rendered the Fund "culpable". If "culpability" was not enough to support an award of fees, then nothing short of "bad faith" will.

With respect to Factor 5 ("the relative merits of the parties' position", the only factor it discussed), the Third Circuit held that the statutory issue involved was a "close and difficult one", and that the "divergence of opinion', which divided the Courts of Appeals and the panel itself, made it "clear to us that there was no culpability or bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits."

Obviously the Third Circuit conflated Factors 1 and 5, holding that the closeness of a statutory issue negates both culpability and bad faith and, therefore, is in and of itself sufficient to deny fees. With all due respect, the Court's rationale stands ERISA on its head. As held by this Court in

Russell, *supra*, the purpose of ERISA's fee-shifting provision is to permit participants to enforce their benefit claims. There must be some certainty in the award of fees, because the few experienced ERISA attorneys who are willing to stake their compensation on the success of a benefit claim, are not willing to play Russian roulette in the fee application.

Even where, as here, a claim's success is based on statutory interpretation, courts may differ in evaluating its degree of "difficulty". Indeed, the Second Circuit, in interpreting the very same statutory provisions whose interpretation the Third Circuit found to be "close and difficult", held that plaintiff's claim was "grounded in text we find to be unambiguous." *McDonald v NYSA-ILA Pension Plan*, 320 F3d 151, 159 (2d Cir 2003). Indeed, it declared that the text was so clear as to render unnecessary resort to letters from the Department of Justice and Internal Revenue Service and Regulations from the Department of Treasury addressing the issue. *Id.*[7]

Winning an ERISA benefit case is hard enough, as evidenced by the countless unsuccessful plaintiffs whose bones litter the legal landscape. It should not be made even harder by denying them attorney's fees after they win an obviously meritorious case.

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7. Plaintiff in *McDonald* was awarded attorney's fees by the district court. 2002 WL 1974054 (SDNY, Aug 27, 2002).